**Employer Status Determination**
**Rail-West, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Rail-West, Inc. (Rail-West) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA).

Rail-West reports that it was incorporated June 26, 1986 and began operations July 1, 1986. Rail-West owns the Willamette Valley Railroad Company, the Willamina and Grande Ronde Railway Company, and the Willamette Valley Railway. See 58 Fed. Reg. 12599, March 5, 1993.[1] Rail-West also performs track rehabilitation work for nine non-railroad companies, railcar repair for two other non-railroad companies, contract switching for another non-railroad company, and rail contract service for the rail division of the Port of Tillamook Bay (Port), a governmental subdivision of the State of Oregon.[2] Rail-West states that 70-90 percent of its revenue derives from its non-railroad contractual operations and its remaining revenue from its subsidiaries and from the contract with Port.

Section 1(a)(1) of the RRA (45 U.S.C. 231(a)(1)) defines the term

"employer", insofar as is relevant here, as follows:

> (i) any express company, sleeping-car company and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Section 1(a) of the RUIA (45 U.S.C. 351(a)) defines "employer" in substantially the same way.

The first question that we must address is whether Rail-West, as the parent of several railroad subsidiaries, is "owned or controlled by or under common control with [those subsidiary railroads]." A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier subsidiary is not under common

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[1]The Willamette Valley Railroad Company, the Willamina and Grand Ronde Railway, and the Willamette Valley Railway have been held to be covered employers under the Acts. See: L-85-75, B.C.D. 93-45, and B.C.D. 93-46.

[2]The rail division of Port has been held to be an employer under the RRA and RUIA. See Legal Opinion L-56-13, dated January 17, 1956.

control with the subsidiary within the meaning of § 3231 of the Internal Revenue Code. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir., 1993).

Rail-West stands in the same relation to the Willamette Valley Railroad, the Willamette Valley Railway, and the Willamina and Grande Ronde Railway as Union Pacific Corporation did to the Union Pacific Railroad. Accordingly, it is the determination of a majority of the Board that Rail-West is not a carrier affiliate employer under the Railroad Retirement and Railroad Unemployment Insurance Acts with respect to any services its employees perform for its carrier subsidiaries because it is not owned or controlled or under common control with those subsidiaries. As Rail-West meets no other definition of a covered employer under the Acts, in the opinion of a majority of the Board, Rail-West is not a covered employer.

This conclusion leaves open, however, the question whether the persons who perform rail service under Rail-West's arrangement with Port should be considered to be employees of Port rather than of Rail-West. Section 1(b) of the RRA and section 1(d)(1) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services and rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

The Interstate Commerce Commission has determined that Port operates as a common carrier by Rail. Tillamook County Naval Airport Commission, 290 ICC 817 (1955), as summarized in Legal Opinion L-56-13. A rail carrier subject to the Interstate Commerce Act is under a duty to provide locomotives and cars to transport the public's property as part of its operation as a carrier. The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer. See Restatement (Second) of Agency § 214. The Board believes that operation of train service is a function so essential to the statutory duty of a rail carrier to provide rail transportation that the

carrier must retain the power to direct and control the individuals who conduct the service. Cf. Annotation, What Employees are Engaged in Interstate Commerce within the Federal Employers' Liability Act, 10 A.L.R. 1184 (1921), at 1220-1226; and Annotation, Who is an Employee in Interstate Commerce within Federal Employers' Liability Act as Amended in 1939, 10 A.L.R. 2d 1279, 1296 (1950), (both discussing liability of the railroad for injuries to locomotive engineers, firemen, brakemen and conductors). Finally, regulations of the Board provide that where an individual is subject to the direction and control of an employer, the employee relationship is established "irrespective of whether the right to supervise and direct is exercised." See 20 CFR 203.3(b).

The individuals provided to Port by Rail-West act as crew for the trains which Port must run in satisfaction of its rail carrier obligation. Port must retain ultimate control of the performance of its service as a common carrier. Accordingly, it is the determination of the Board that service performed by employees of Rail-West under contract with Port of Tillamook Bay is creditable as service as employees of the Port under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr. (dissenting in part, opinion attached)

Jerome F. Kever

Attachment

CCCook:SABartholow:TWSadler:KTBlank:scm:ik:atr:cmw
RWI2287.COV

**TO:** The Board

**FROM:** Catherine C. Cook
General Counsel

**SUBJECT:** Rail-West, Inc.
Employer Status

Attached is a draft determination finding that Rail-West, Inc. is not a covered employer but that certain of its employees, i.e. those performing train service under contract, are covered employees.

Rail-West, as parent of its rail carrier subsidiaries, is in the same position as the Union Pacific Corporation, which was found not to be under common control with its subsidiary, the Union Pacific Railroad. Union Pacific Corporation v. United States 5 F. 3d 523 (Fed. Cir., 1993). The attached determination follows Union Pacific in holding that Rail-West is not under common control with its rail carrier subsidiaries, and hence is not a covered employer with respect to the service provided the subsidiaries. However, the proposed ruling finds that the individuals performing train service under the contract between Rail-West and Port of Tillamook Bay, an employer under the Acts, should be considered employees of the rail carrier and that their service should be creditable under the Acts. The Board has previously recognized that other common carrier related services, such as maintenance of way, maintenance of signals and car repair, can be contracted out. This proposed decision distinguishes the operation of the trains from these types of services. The proposed decision holds that a failure to consider operators of trains as employees under the Acts would subvert the purpose of the Acts wherein a separate social insurance system for railroad workers was established.

Attachment

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Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968, at 341). and individuals performing service under its contracts are employees of Rail-West rather than employees of Port. Kelm, supra.